



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ABF Freight System, Inc.

File: B-221646

Date: September 18, 1987

DIGEST

A motor carrier with a general commodities division that operates regular van equipment and a "SCAT" division that operates special equipment, including flatbeds, refrigerated, and temperature controlled units, issued tenders which offered special rates to the government. The tender rates were based on use of the special equipment. Government contractors called the general commodities division for transportation service that would protect from freezing 38 truckload shipments of pickles. The carrier transported 13 of the shipments in closed vans containing portable heaters, and 25 shipments in "refrigerator" equipment, and collected charges based on rates that were higher than the tender rates. GSA applied the lower tender rates and deducted overcharges. Held: Applicability of the tenders did not depend on whether shippers called a specific division but on the type of equipment used. The tenders were not applicable to the 13 shipments moved in closed vans; however, they were applicable to the other 25 shipments since special equipment reasonably can be viewed to include the "refrigerator" equipment used.

DECISION

ABF Freight System, Inc. (ABF) requests review of deduction actions taken by the General Services Administration (GSA) to recover alleged overcharges collected by ABF on 38 shipments of pickles. We conclude that GSA's actions were correct on some bills but incorrect on others.

BACKGROUND

ABF is a motor carrier which for operational purposes is divided into at least two divisions, a "SCAT" division, which performs transportation services exclusively with special equipment and operates from a separate office and

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location, and a general commodities division. The general commodities division moves traffic in regular vans. In the performance of pickle-supply contracts with the Defense Contract Administration Services Management Area (DCASMA), Milwaukee, Wisconsin, two contractors, Bond Pickle and Krier Preserving Company, called ABF's general commodities division in 1982 and 1983 for service. Bond's traffic manager informed ABF each time he ordered equipment during the months from October to April, inclusive, of the requirement to protect the pickles from freezing by providing either heater service or temperature controlled vans. The record shows that Bond originated 31 of the 38 shipments involved. While the record contains no similar information concerning Krier's practice, each of the 38 Government Bills of Lading (GBLs) contained a bold-face typed notation, "PROTECT FROM FREEZING." Of the 38 GBLs issued, 13 contained the additional notation, "AV," while 25 contained the notation, "AR." The "AV" reference indicated that closed van equipment was used, while "AR" indicated "refrigerator" equipment.1/

After the government paid ABF's charges^{2/} GSA determined that lower charges, published in tenders I.C.C. ABF 1097 and 1097-A were applicable, and deducted, as overcharges, the difference between the charges collected by the carrier and the lower charges that would have been assessed on the basis of the tender rates.^{3/} See 31 U.S.C. § 3726 (1982). The issue of whether these tenders were applicable arises through a dispute over the type of equipment used and incidental service performed by the carrier to perform the transportation. ABF also raises the question of whether the tenders required shippers to call ABF's "SCAT" division, as a condition of applicability. To resolve these issues it is

1/ These equipment designations are among the motor carrier equipment codes listed in Appendix "B" of Chapter 4 of the Defense Logistics Agency Handbook 8300.2.

2/ The record does not disclose the specific tariff basis for ABF's charges.

3/ GSA's report shows that the overcharge amounts ranged from \$638.20 to \$2,248.69 with the exception of one overcharge of \$130. The deductions were made from other monies due the carrier.

necessary to consider the following pertinent tender provisions.

Tender 1097 provides (in block 13, "Route"):

"ABFS direct-applicable only on shipments which move on flatbed, convertavan, drop deck or other special equipment including refrigerated equipment but will not apply in regular vans or open tops."

Tender 1097-A (Appendix "A") provides that:

"All rates (except as noted) herein are restricted to apply only on traffic which is loaded on flatbed or temperature controlled equipment."

We see no disagreement in the record over certain material facts: that the carrier's general commodities division actually transported the shipments; the equipment used for each shipment, basically, was a "van" (there is disagreement over the particular type of van); "closed" vans, containing portable (catalytic) heaters were used to transport the 13 shipments identified on the GBLs with the "AV" equipment notation; and "refrigerator" vans were used for the other 25 shipments identified on GBLs with the "AR" notation.

As to the 13 "AV" shipments, GSA contends that by placing the heaters in the closed vans, ABF converted them into "temperature controlled" vans, or "special equipment", which are covered by Tender 1097 and Tender 1097-A. ABF disagrees, insisting that the vans, even with the heaters, are nonetheless "closed vans"; therefore, the tenders are not applicable to the 13 shipments.

Concerning the 25 other shipments transported in "refrigerator" equipment, GSA argues that the "refrigerator" vans used were intended by the tenders to be included under the general description of special equipment, including refrigerated equipment (Tender 1097) and temperature controlled equipment (Tender 1097-A). ABF argues that even if the "refrigerator" vans used to transport the 25 shipments are considered within the general equipment descriptions of the tenders, the tenders were not applicable since the shippers did not call the "SCAT" division for service, and the "SCAT" division did not perform the service. In

response, GSA contends that the general commodities division should have referred the shippers' calls to the "SCAT" division because ABF personnel were put on notice by the shippers' telephone calls that the shippers required the special equipment operated by the "SCAT" division and each GBL gave notice of the requirement to protect the pickles from freezing.

DISCUSSION

Concerning the 13 GBL shipments containing the "AV" (closed van) equipment code, GSA clearly recognizes that they were transported in vans which, but for the portable heaters, would be classified as "regular vans" having no inherent or permanent temperature control, mechanical or other features capable of providing protection of their contents from excessive temperature, whether hot or cold. We believe that to view regular closed vans as "special" or "temperature controlled" equipment simply because portable heating devices were placed in the units to provide a measure of protection for selective shipments from excessively cold temperatures would constitute an unreasonable interpretation of the terms, "special" and "temperature controlled" equipment. Instead, we believe that the tenders contemplate permanent, built-in features, rather than temporary innovations. As a result, we conclude that the tenders were not applicable to the 13 shipments transported in the closed vans with the portable heaters.

As explained below, we conclude the tenders were applicable to the other 25 shipments transported on GBLs containing the "AR" notation.

The motor carrier equipment listed in Appendix "B" of Chapter 4 of the DLAH 8300.2 contains references to two "refrigerator" equipment codes: "AK" and "AR." The "AK" code is described as "Refrigerator (Perishable Foods)" while the code, "AR," relates to "Refrigerator (Other Items)." The question here is whether the tender terms, "special equipment" and "temperature controlled" equipment are intended to cover the 25 shipments transported in refrigerator equipment designed to transport non-perishable foods ("AR").

Even though Tender 1097 states that "special equipment" includes "refrigerated equipment", "flatbed" and "other units," the bare term "refrigeration" as a technical means of attempting to identify motor carrier equipment, is ambiguous. See Houff Transfer, Inc., Extension - Change in Commodity Description. 72 M.C.C. 563, 567 (1957). In the Houff case the Interstate Commerce Commission explained, however, that "mechanical refrigeration" (as it relates to carrier equipment) clearly identifies equipment that is--

"necessarily insulated, heavy, and expensive, and therefore economically unsuitable for any protracted use in the movement of commodities which do not require refrigeration." 72 M.C.C. supra, at 568.

Although there is room for doubt, it appears that the equipment listed in Tender 1097 was not intended to be construed in a technical sense, but in a broad general sense. This inference reasonably flows from the fact that the tender includes, for example, "flatbed" within the term "special equipment," whereas, in a technical sense, it is not. See Moss Trucking Co., Inc., Investigation of Operations, 103 M.C.C. 91, 102 (1966). In any event, Tender 1097 is unclear on the point and where tariffs drafted by carriers are ambiguous in material respects they are construed against the carriers. See cases cited in 55 Comp. Gen. 1423, 1428 (1976). Viewing "AR" or "Refrigerator (Other Items)" equipment in a broad, general sense as "special equipment," we conclude that during the period of its effectiveness, Tender 1097 was applicable to the shipments transported in the "Refrigerator" ("AR") equipment. Based also on the rule that ambiguous tariffs are construed against the drafting carriers, we conclude that Tender 1097-A, during the period of its effectiveness, was also applicable to the shipments moved in the "Refrigerator" equipment.

We find no indication in either tender that requires a finding that their applicability depended on shippers calling a specific AFB operating division. Although Tender 1097 contained a specific telephone number to call for service (and assuming it was a "SCAT" division number), the notation

does not appear mandatory. Rather, "to place an order for service please call * * *" implies more of a suggestion or recommendation as a convenience to the shippers. We note that Tender 1097-A contained no similar recommendation. We also note, contrary to ABF's contention, that neither tender indicated that it was issued by the "SCAT" division. Each shows that it was issued by "ABF Freight System, Inc." Generally, operational details have no legal effect on the mutual obligations of a contract of carriage. See ABF Freight System, Inc. (East Texas Motor Freight), B-221609, February 28, 1986.

It is reasonably clear that the tenders' applicability was intended to depend simply on the nature of the equipment used to perform the transportation services and not on the type of equipment requested, or on a call to a specific operating division. We therefore conclude that the tenders applied to the 25 shipments whose GBLs contained the "AR" reference. Accordingly, GSA's deduction actions with respect to the 13 "AV" GBL shipments were incorrect, whereas the deduction actions taken with respect to the other 25 "AR" GBL shipments were correct and are sustained.

for *Harry R. Van Cleave*
Comptroller General
of the United States